

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Arb.P. No.39 of 2007

% Date of decision: 11.09.2007

DSC-VICON VENTURES PVT. LTD. ...PETITIONER
Through: Mr. S.K. Maniktala with
Mr. Arvind Kumar, Advocates.

Versus

M/S. CONSULTING ENGINEERING
SERVICES (INDIA) PVT. LTD. & ORS. ...RESPONDENTS
Through: Mr. Anurag Dayal Mathur with
Mr. C.L. Kalia, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The petitioner claims to be a Special Purpose Vehicle Company having its constituent as D.S. Construction Limited and M/s. Vimal Construction Company. The petitioner was awarded the work of BOT project of four laning of existing two lane road from Rajpur Durg in Chhatisgarh State. Respondent No.1 was appointed as a consultant to the project. An agreement in this behalf was executed between the petitioner and respondent No.1 on 19.9.2003.
2. The dispute resolution mechanism was provided in clause 6.2 of the contract which reads as under:

“6.2 Dispute Settlement

Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party for settlement in accordance.

Disputes shall be settled by arbitration in accordance with the following provisions:

6.2.1 Selection of Arbitrators

Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

(a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the President, Indian Roads Congress, New Delhi, for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternately strike names there from, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the President, Indian Roads Congress, New Delhi, shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.

(b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and CES shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by Secretary, the Indian Council of Arbitration, New Delhi.

(c) If one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the

Secretary, Indian Council of Arbitration, New Delhi to appoint a sole arbitrator for the matter in disputes, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

6.2.2 Rules of Procedure

Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act 1996, of India unless CES is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract.

6.2.3 Miscellaneous

In any arbitration proceedings hereunder:

(a) Proceedings shall, unless otherwise agreed by the Parties, be held in Delhi.

(b) The English language shall be the official language for all purposes; and

(c) The decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement.”

(emphasis supplied)

3. The period of contract is stated to have ended in September 2004.

Respondent No.1 claimed that there was an outstanding amount of Rs.36.00 lakh due from the petitioner. The amount was disputed by the petitioner. The respondents raised the total amount of the claim to Rs.61.00 lakh approx. by the subsequent letter dated 29.1.2005, which was disputed by the petitioner vide letter dated 4.2.2005. No settlement emerged.

4. Respondent No.1 invoked the arbitration clause in terms of the letter

dated 9.9.2005 to which the petitioner did not respond. It is the case of the petitioner that thereafter the petitioner received a letter dated 26.12.2006 from one Shri B.L. Garg, respondent No.3, Additional District Judge (Retd.) stating that he has been appointed as the arbitrator by the Arbitration Committee of the Indian Council of Arbitration on 17.10.2006 communicated to the arbitrator vide letter dated 22.12.2006.

5. The petitioner has thereafter filed the present petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act) seeking the appointment of what is stated to be an independent and impartial person.
6. The basic ground raised in the petition is that in terms of the arbitration clause the appointment of the arbitrator had to take place by the Secretary, Indian Council of Arbitration, New Delhi who was the persona designata and the Arbitration Committee of the Indian Council of Arbitration could not have nominated the arbitrator.
7. Respondent No.1 has contested the petition. A preliminary objection has been raised about the maintainability of the present petition in view of the judgement of the Apex Court in S.B.P. & Co. Vs. Patel Engineering Ltd. & Anr. 2005 (3) Arb. L.R. 285 (SC). The conclusions of the judgement are set out in paragraph 46 and the relevant paragraph is sub-para (ix), which reads as under:

“(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.”

8. It is this submission of the respondent that the recourse of Section 11 (6) of the said Act can only take place if the appointment is through the process of Court and where the intervention of Court has not been involved in the process of appointment of the arbitrator any objection about the jurisdiction of the arbitrator has to be before the arbitrator himself.
9. Insofar as the merits of the controversy are concerned, it is pointed out that the arbitration clause only provides for an application by the party to the Secretary, Indian Council of Arbitration and does not make the Secretary as the persona designata. It is in view thereof that the application was so received on behalf of the Secretary and placed before the Arbitration Committee. The decision of the Arbitration Committee was ratified by the Registrar of the Indian Council of Arbitration in terms of Rule 23 of the Indian Council of Arbitration. The said Rule reads as under:

“Rule 23

.....

(a) In case a Sole Arbitrator has to be appointed, the Registrar shall, by a notice in writing, call upon the parties to the dispute to forward the name of an agreed arbitrator from among the Panel of Arbitrators. The said notice shall specify the period within which the nomination shall be made, which shall not be more than thirty days from the date of the said notice to the respective parties. If the parties fail to agree on the person to be appointed as sole arbitrator within the time granted by the Registrar, the Registrar in consultation with the Chairman of the Committee and in his absence in consultation with the member of the Governing Body designated by the Chairman, shall appoint the sole arbitrator from among the Panel of Arbitrators. If one of the parties is a national or resident of a country other than India, the sole arbitrator shall, as far as possible, be chosen or appointed by the Registrar from among the nationals of a country other than that of either of the parties. The sole arbitrator so nominated shall constitute the

arbitral tribunal to hear the dispute and shall be appointed as such in writing by the Registrar. The Registrar shall give notice to the Parties of the constitution of the arbitral tribunal.”

10.It is the further submission of the respondent that the petitioner, in fact, participated in the arbitration proceedings before the arbitrator and in this behalf reliance has been placed on the proceedings before the arbitral tribunal, held on 10.1.2007, which reads as under:

“Whereas, the Arbitration Committee of the Indian Council of Arbitration, New Delhi at its meeting held on October 17, 2006 decided to request me to act as the Sole Arbitrator to decide the disputes that have arisen between the above named parties and I have received the said request on 22.12.2006.

I entered upon referenced on 26.12.2006 and sent the notice to the parties to file their Statement of claims/Counter statement of claims, if any, together with documents in support thereof for 09.01.2007. However, on 08.01.2007, the A.R. On behalf of respondent appeared and I also received a letter from claimant side for adjournment, the matter was taken up on 08.01.2007 instead of 09.01.07.

Now Therefore Notice Is Hereby Given That:

The hearing in the above case will be held on 31.01.2007, at 4:30 pm at A-9, Ganpati Apartments, 6, Alipur Road, Civil Lines, Delhi-110054.

The Claimant shall file his Statement of claims, if any, together with documents in support thereof on the said date and time. Parties are further directed to deposit arbitration fees.

If any of the parties fails to attend the hearing, I (Arbitrator) shall be at liberty to conduct the proceedings, ex-parte.”

11.In addition, it is submitted by learned counsel for the respondent that the party who intends to challenge the arbitrator shall within fifteen (15) days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in

sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. This is so provided in sub-section (2) of Section 13 of the said Act. In the present case, the notice of the arbitration was received by the petitioner on 26.12.2006 and the petition has been filed on 2.2.2007.

12. In order to appreciate the aforesaid controversy, the relevant provisions are reproduced hereunder:

“12. Grounds for challenge - (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure. - (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to

the arbitral Tribunal.

(3) Unless the arbitrator challenged under sub-section (2), withdraws from his office or the other party agrees to the challenge, the arbitral Tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under subsection (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

13. Heard learned counsels for the parties.

14. Insofar as preliminary objections raised by the respondents are concerned, the scheme of Sections 12 & 13 provide for the ground for challenge to the appointment of an arbitrator. Section 11, in fact, referred to the appointment of the arbitrator. Section 12 provides for an arbitrator to disclose any circumstances which could give rise to justifiable doubts as to his independence or impartiality. There is no such allegation against the arbitrator in the present case. The only challenge is to the appointment of an arbitrator by a person other than the persona designata. Section 13 thereafter provides for the mode and manner of challenge of such appointment. The challenge has to be laid within fifteen (15) days of a party becoming aware of the constitution of the arbitral tribunal. Undisputedly the petitioner has not laid the challenge within fifteen (15) days. Sub-section (3) of Section

13 of the said Act also provides that it is the arbitral tribunal, which shall decide on the challenge.

15. The provisions have been examined and considered and the judgement of the Apex Court in S.B.P. & Co. Vs. Patel Engineering Ltd. & Anr. case (supra), in my considered view, leaves no manner of doubt that the conclusion reached by the Supreme Court is that a challenge to the arbitral tribunal has to be decided by the arbitral tribunal itself except in cases where the appointment is made with the intervention of the court. The present case is not one where the arbitrator is appointed by the court and thus there is no merit in the contention of the learned counsel for the petitioner. Section 11 of the said Act would have no application as Section 11(6) of the said Act reads as under:

“11. Appointment of arbitrators.

.....

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

16. In view of the aforesaid position, there is also merit in the third contention of the learned counsel for the respondent that the petitioner has failed to lay challenge within the time prescribed under sub-section (2) of Section 13 of the said Act and thus such a challenge cannot be laid.

17. On analysis of the aspect of persona designata, a reading of the clause shows that what is provided for is that a party can apply to the Secretary, Indian Council of Arbitration as per sub-clause (c) of clause 6.2.1 but it nowhere provides that it is the Secretary, Indian Council of Arbitration who will so appoint an arbitrator. The respondent has set forth the procedure whereby the application received by the Secretary is placed before the appropriate Arbitration Committee which appointed the arbitrator and the same was ratified by the Registrar, Indian Council of Arbitration in terms of Rule 23 of the Indian Council of Arbitration.

18. Thus, even on this account the challenge by the petitioner cannot be maintained on merits.

19. It does appear that the petitioner participated in arbitral proceedings as recorded in the proceedings before the arbitrator and seems to have had a second thought. The arbitrator is a retired Additional District Judge. There is no reason disclosed by the petitioner why the particular arbitrator would not be impartial. The challenge seems to be laid for just the sake of such challenge rather than on any merit/objection.

20. I find no merit in the petition and the same is dismissed with costs quantified at Rs.5,000.00.

21. Interim order dated 20.3.2007 made absolute on 25.4.2007 stands vacated.

September 11, 2007
b'nesh

SANJAY KISHAN KAUL, J.